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No. 889

IN THE

SUPREME COURT OF THE UNITED STATES

W. S. ROGERS, ET AL, ... *Appellants*

v.

CITY OF PINE BLUFF, ARKANSAS, ... *Appellee*

JURISDICTIONAL STATEMENT

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v.

CITY OF PINE BLUFF, ARKANSAS, *Appellee*

JURISDICTIONAL STATEMENT

(a) The opinion of the court in the cause from which this appeal is taken is reported in 237 Arkansas 117 (not yet in volume form), 372 S.W. (2) 620, The Law Reporter, No. 4, p. 117, October 28, 1963.

(b) The original proceeding was predicated on annexation by appellee of property on the periphery of Pine Bluff, Arkansas, on which appellants resided. Annexation was undertaken under Ark. Stat's. §19-307, by the terms of which the inhabitants of the territory to be annexed are provided no vote at the election on which the issue of annexation is submitted to the populace, but are bound by a majority vote of the electorate of the city desiring annexation.

(ii) The opinion of the Arkansas Supreme Court was rendered and judgment entered October 28, 1963. Rehearing was sought and denied December 16, 1963. Notice of appeal was filed January 8, 1964, in the Arkansas Supreme Court.

(iii) This court has jurisdiction under 28 USCA §1257(b), the constitutionality of Ark. Stat's §19-307 being challenged as a denial of equal protection, prohibited by Amendment 14 to the Constitution of the United States.

(iv) Cases sustaining jurisdiction are:

Baker v. *Carr*, 369 U.S. 186, 7 L. Ed (2) 663, 82 S. Ct. 691

Gray v. *Sanders*, 372 U.S. 368, 9 L. Ed. (2) 821

(v) The text of Ark. Stat's §19-307 is:

Annexation proceedings by municipality — Election — Petition — Procedure. — When any municipal corporation shall desire to annex any contiguous territory thereto, lying in the same county, whether containing one [1] or more judicial or fiscal districts, it shall be lawful for the governing body of said municipal corporation to submit the question to the qualified electors at least one [1] month before the annual election, or at a special election to be called for that purpose. If a majority of the votes cast on that question shall be in favor of annexation, the said corporation shall present to the County Court a petition praying for such annexation. The like proceeding shall be had on said petition as is prescribed in thirty-fifth (35), thirty-sixth (36) and thirty-seventh (37) sections (19-101—19-103) of this act, so far as same may be applicable, and if within thirty (30) days after a transcript shall be delivered as provided, no notice of a complaint against such annexation shall be given, at the end of said thirty (30) days (and in case of any such complaint, then after the end of thirty (30) days after the dismission of said complaint), the territory shall, in law, be deemed and taken to be included in and shall be a part of said corporation, and the inhabitants thereof shall, in all respects, be citizens thereafter

> of said municipal corporation, and the County Clerk shall make out and certify to the governing body of said municipal corporation and the Secretary of State the transcripts provided for in the preceding section.

(c) The question presented by this appeal: Is a state statute which permits annexation of territory adjoining a municipal corporation on majority vote of inhabitants of the corporation, without the privilege of voting by inhabitants of the territory to be annexed, a denial of equal protection of law within the scope of Amendment 14 to the Constitution of the United States?

(d) This action originated as an annexation proceeding under which property adjoining Pine Bluff, Arkansas, was incorporated into the city. The Arkansas Statute under which the proceeding was held provides that annexation is accomplished by presentation of the proposition at an election in which inhabitants of the city are permitted to vote and the inhabitants of the territory sought to be annexed are not. A vote favoring annexation was taken and the annexed inhabitants protested through the Arkansas Supreme Court, which found the proceeding valid. The question of constitutionality of the statute, under the Fourteenth Amendment, was raised in the petition for rehearing, which was overruled (R.10, 19).

Appellants recognized that they have a heavy burden in this court. Their insistence that annexation at an election in which they are not entitled to vote is an obvious denial of equal protection has been decided adversely in *Hunter* v. *City of Pittsburgh* (1907), 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151. Furthermore, the Arkansas statute challenged here was previously the subject of an appeal to this court in *Marsh* v. *City of El Dorado*, 233 S.W.

(2) 536, 217 Ark. 838, appeal dismissed 71 S.Ct. 507, 340 U.S. 940, 95 L. Ed. 678. In *Marsh*, however, the issue was not presented on the same basis as here, it being contended that the statutory provision that a favorable vote was *prima facie* evidence of a valid annexation was a denial of due process. This was found not to involve a federal question of substance.

Appellants recognize the difficulty presented by these decisions, but suggest that recent emphasis on the right to vote, as indicated by decisions of this court in Baker, Gray and the case decided February 17, 1964, requiring equal representation in congressional districts, based on population, have cast a new light on such decisions as Hunter.

Hunter is predicated on the reasoning that cities are political subdivisions of the states, subject to plenary control, expansion, contraction, or even abolition. It is stated, in effect, that since the state legislatures have such complete control over cities it is not necessary that the inhabitants of an area sought to be annexed have any right to vote on the proposition. It is assumed that the inhabitants whose property is absorbed have a remedy in that they may vote on their legislative representatives, who have the ultimate power.

This is true so far as is goes, but the flaw is in permitting the inhabitants of the city to vote to annex, when a corresponding right is denied the affected citizens in the territory under consideration. Were the matter left exclusively in legislative hands, no disparity would exist, but when one segment of the populace is permitted to vote, and their vote materially affects others similarly situated, those denied the right of expression have a degree of protection far less than equal.

(e) The question presented is one that will recur as America's population expands and becomes increasingly urban. As matters now stand, the scales are weighted exclusively on the side of the city. Many states have statutes similar to Arkansas', though many have seen fit to temper power with concessions to the annexed inhabitants by permitting them to vote, as well as those who desire annexation. Substance of constitutional issues is a difficult term to define. Where the hundreds of inhabitants of the territory annexed to Pine Bluff are concerned, it is a question of supreme importance. Since the same power can presently be exercised by any state, it is a matter of considerable concern, universally. Denial of opportunity to vote on any proposition that materially affects the welfare of the electorate is simply repugnant to the deeply held convictions of many citizens, who regard control over their future as a guaranteed right in or form of government. If the need of cities to expand is pressing, it must be met, but this should not be at the expense of depriving those affected by expansion of any voice in the matter.

(h) Appended is a copy of the opinion of the Arkansas Supreme Court and (i) a copy of the judgment entered thereon.

ROGERS V. CITY OF PINE BLUFF.
5-3085

Opinion delivered October 28, 1963.

Appeal from Jefferson Circuit Court, *Henry W. Smith*, Judge; affirmed.

Griffin Smith, for appellant.

George N. Holmes and *John Harris Jones*, for appellee.

PAUL WARD, Associate Justice. This appeal comes from an order of the circuit court approving the annexation of certain lands to the City of Pine Bluff. The lands consist of 7.52 square miles which lie east, south and west of and are contiguous to said city.

The annexation proceedings were commenced with the filing of a petition by the City on November 20, 1961, and subsequent steps taken, all pursuant to Ark. Stat. Ann. §19-307 (Repl. 1956) and related sections. There is no contention here that all procedural steps pursuant to all applicable statutes were not taken by the City and the county.

The only point relied on by appellants for a reversal is that "the territory sought to be annexed is unreasonably large". In support, and as a basis of their contention, appellants rely heavily upon our holdings and announcements in the cases of *Vestal* v. *Little Rock*, 54 Ark. 321, 15 S.W. 891 and *Cantrell* v. *Vaughn*, 228 Ark. 202, 306 S.W. 2d 863. It appears to be appellants' contention that the trial court failed to follow the fundamental rules applicable to annexation cases as laid down in the *Vestal* case. There it was said:

". . . city limits may reasonably and properly be extended so as to take in contiguous lands, (1) when they are platted and held for sale or use as town lots, (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owners, (3) when they furnish the abode for a densely settled community, or represent the actual growth of the town beyond its legal boundary, (4) when they are needed for any proper town purposes, as for the extension of its streets, or sewer, gas or water system, or to supply places

for the abode or business of its residents, or for the expansion of needed police regulation, and (5) when they are valuable by reason of their adaptability for prospective town uses . . . "

Applying the above general rules to the testimony introduced at the trial court we think this case must be affirmed. The record shows that the lands proposed for annexation are divided into four separate areas. Area 1 lies east of the city; Area 2 is southeast of the city; Area 3 lies south and west of the city; and, Area 4 lies northwest of the city. Appellants, in support of their position, contend that "A substantial portion of the proposed annexation represents property not settled nor adaptable for settlement"; and that "The city did not demonstrate ability to furnish services to an area of this magnitude." With these contentions of appellants in mind, we can more easily understand the weight and relevancy of the testimony by relating it to each separate Area.

Area 1. One witness stated that eight new industries would be brought into the city with annexation—naming them; a realtor said one acre was sold for $2,400 and that he has lands listed for $2,000 per acre. The city planner said 25% is industrial. No landowner is objecting.

Area 2. One witness said 50% was built up—part in modern homes; the city engineer said there were 2,152 people on 1,000 acres, and that a drainage bottleneck affects the present city limits. No landowner is objecting to annexation.

Area 3. A realtor said this area has no value for agricultural purposes; that the Chamber of Commerce

paid $1,000 per acre for a development site—and it is one of three industrial sites available for the city; many new homes are being built; the population is 2,642 for 1,405 acres; it will be provided with sewer facilities—one of the worst problems at present. There is a new school, and building lots sell for $1,250 to $2,000 each. For farm purposes the land is not worth more than $100 per acre but is worth many times that price for building and industrial purposes.

Area 4. This area is known as Dew Drop, and appellants say it is a "self-sufficient, unitary community which has worked out its own destiny—that it is economically, geographically and politically an entity", and that it has practically no affinity to Pine Bluff. There is, however, testimony to the contrary. One witness who lives there said it was a part of Pine Bluff. There was testimony (by appellants) that part of the Area was known as College Heights to Pine Bluff; that some get mail addressed to Pine Bluff and some have telephone, gas and electricity from Pine Bluff distribution centers; they use the Pine Bluff telephone exchange with no toll charges; and, most of the people are employed in Pine Bluff.

It would serve no useful purpose to detail more of the voluminous testimony. Suffice to say there was testimony to the effect that Pine Bluff was financially able to furnish the annexed areas all necessary utilities as well as fire and police protection, and that it would do so.

In the *Vestal* case, *supra*, it was also pointed out that annexation should be ordered: "In all cases, however, where actual unity is practicable, legal unity should

be ordered as promising the greatest aggregate of municipal benefits." In this connection it is pertinent to note the trial court made the findings:

"'That the territory sought to be annexed is already part of the Pine Bluff community in practice. All that remained to be done was annexation. The territory . . . is an outgrowth of the City of Pine Bluff and after annexation will make up a homogeneous city.'"

Other interesting and pertinent findings of facts, set out below, were made by the trial court:

"The property values in the territory sought to be annexed show that the lands are valuable for city use or for adaptability for prospective town use rather than for use or adaptability for use for agricultural purposes.

"The population in the area sought to be annexed is approximately 7,500. In what has been described in the testimony as area four or the Dew Drop area over 2,000 people now live which is more people than live in the county seats of Rison, Star City or Arkansas City.

"The territory sought to be annexed is needed for proper town purposes, the extension of streets, sewer system, gas and water and to provide residences and the City's need for business expansion. Pine Bluff is expanding and expanding rather rapidly.

"The area sought to be annexed is very much in need of police regulation."

We have uniformly held that the order of the circuit court (in annexation cases) will be upheld if it is supported by substantial evidence. See: *Barton* v. *City of*

Fort Smith, 214 Ark. 516, 216 S.W., 2d 884; *Mann* v. *City of Hot Springs*, 234 Ark. 9, 350 S.W. 2d 317; and the *Cantrell* case, *supra*, relied on by appellants. Also, the burden was on appellants to show the lands should not be annexed. *Dodson, et al.* v. *Mayor and Town Council, Fort Smith*, 33 Ark. 508.

Since we are unable to say the order and findings of the trial court were not supported by substantial evidence, the same are affirmed.

Affirmed.

HARRIS, C. J., and JOHNSON, J., not participating.

IN THE SUPREME COURT OF ARKANSAS

October Term 1963 — October 28, 1963

W. S. ROGERS ET AL., ... *Appellants*

v. Appeal from Jefferson Circuit Court

CITY OF PINE BLUFF ..... *Appellee*

JUDGMENT

The cause came on to be heard upon the transcript of the record of the circuit court of Jefferson County, and was argued by counsel; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is, therefore, considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellee recover of said appellants all its costs in this Court, in this cause expended, and have execution thereof. HARRIS, C. J., and JOHNSON, J., not participating.

October 28, 1963.

Respectfully submitted,

GRIFFIN SMITH

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For Appellants.